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Dinnerstein: The Leo Frank Case

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tion of his current dogma, instead of fully and frankly attempting to deal with current problems in terms of the reality of the present. As a result, the book is at best an irrelevancy—largely of interest to the best minds of the eighteenth century.

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age. Here was a presidential candidate who told the voters what he believed in, irrespective of how many votes it might cost him." *Supra* note 1, at 241 n.95.

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The Leo Frank Case. By LEONARD DINNERSTEIN. New York: Columbia University Press, 1968. Pp. 248. $6.95.

The subject matter of this documentary is a tragedy that lawyers would like to believe could never happen. In 1913 Leo Frank, a man of Jewish descent, was accused of the rape and murder of Mary Phagan, a thirteen-year-old female employee of the factory he managed in Atlanta, Georgia. He was convicted in a trial that was a mockery of due process of law, the rules of evidence, and many of the other fine principles that law students are taught to believe exist in our democratic republic. After several years during which every legal channel of appeal was exhausted, Frank's death sentence was commuted by the Governor of Georgia to life imprisonment. Shortly thereafter Leo Frank was lynched by a mob of "upright" citizens who disagreed with the Governor's decision.

In this highly readable narrative, Leonard Dinnerstein delves into Leo Frank's case and attempts to separate the facts from the fictions that surround his conviction for murder. Mr. Dinnerstein is not a lawyer, but his examination of the evidentiary materials, the trial, and the subsequent appeal proceedings is a thorough and workmanlike job. He is at his best, however, when he goes beyond the legalistic injustices perpetrated upon Frank and examines the sociological causes and background of southern anti-Semitism. This discussion is central to the case, since it reveals the prejudice on the part of many southerners that led not only to the verdict of guilty by the trial court, but ultimately to Frank's lynching.

Mr. Dinnerstein presents a myriad of questions regarding the state of criminal justice in the United States, both in 1913 and at the present. This historical study of an actual case in which an innocent man was deprived of his life, in light of recent Supreme Court decisions,[1] indicates how far our legal system has come from its early barbarous stages. Many may castigate the Court for "coddling" criminals, but upon reading Mr. Dinnerstein's well documented study of the state of criminal law in 1913, the reasons for many recent rulings become apparent.

As Mr. Dinnerstein so vividly shows, the Frank case was first and foremost a trial by newspapers. When the murder first exploded upon the Atlanta public, it was given the "sensational" treatment by the press. The papers decried the hideousness of the crime and screamed for a conviction. When the police brought in Leo Frank for questioning, that was all the newspapers needed; he was immediately declared to be guilty by the press. In the period following the murder, the public

[1] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968).

was whipped into a frenzy by articles condemning this "northern industrialist Jew" who was viewed as the archetypal destroyer and defiler of young, southern, Christian womanhood. When evidence was raised, both during the trial and during Frank's appeal, which strongly implicated a man named Conley, the janitor in Frank's factory, some of the papers belatedly changed their minds. However, these belated attempts at retractions of earlier statements and more objective examination of the new evidence went largely unheeded by the public. But Frank's legal troubles were just beginning. For example: He was not allowed to be in the courtroom to hear the verdict because of the fear of mob action; an angry mob surrounded the court house shouting for his blood throughout the trial; Frank's own defense counsel never asked for a change of venue, even in light of the above-mentioned facts; two members of the jury that tried Frank were heard by witnesses to have made remarks before the trial to the effect that "that damn Jew should hang"; there was no real evidence that Frank killed Mary Phagan, and most of the circumstantial evidence was collected from witnesses who after the trial swore that the prosecutor had threatened them, forcing them to lie; when Frank's appeals were raised, however, these witnesses were jailed and retracted their admissions; the main witness against Frank was Conley, who swore that he helped Frank drag the body into the basement, yet by the time Conley testified at the trial he had substantially changed his story three times; after the trial two witnesses signed affidavits that Conley had confessed to them that he had committed the murder. All these facts are documented and were available at either the trial or appeal level —yet Leo Frank was convicted.

Public sentiment was so persuasive that even his appeals were denied, though the trial judge stated in his written opinion that he personally was not convinced of Frank's guilt. The Georgia Supreme Court found nothing wrong with the procedure of the trial, and when Frank's attorneys attempted to allege a constitutional issue on his second appeal, the Georgia Supreme Court decided that it was not timely raised. The United States Supreme Court then denied Frank's appeal on a writ of error, even though Justice Holmes stated that he felt Frank had not received due process. Finally, Frank's attorneys appealed for a writ of habeas corpus. In a seven to two decision, with only Holmes and Hughes dissenting, the United States Supreme Court again denied Frank's appeal. Only the Governor of Georgia had the courage to rectify the injustice perpetrated against Frank, and, ironically, in so doing hastened Frank's death at the hands of a lynch mob.

As Dinnerstein points out, a combination of factors killed Leo Frank. Human prejudice and external pressure upon the court and upon the jury forced the verdict of guilty against the weight of the evidence; judicial insistence upon form, rather than substance, and technicality rather than truth, closed Frank's avenues of appeal.

These two key factors raise important but somewhat paradoxical questions about the fundamental nature of the law. If outside influences, not only mobs and news media, but powerful moralists and reformers can influence judicial decisions, then the statue of Justice with her scales, sword, and blindfold is a false icon. The mobs frightened the jury, and Tom Watson (publisher of *The Jeffersonian*), a messianic agrarian reformer and vicious anti-Semite, influenced the mob. His hate literature was widely read and accepted by much of the population of Georgia. The court yielded to prevailing social pressures, largely stimulated by the power of Tom Watson, a southern, rural William Randolph Hearst.

The Supreme Court, however, went in the opposite direction in overruling Frank's appeal. The prevailing mood of the rest of the country, based upon the

northern press and upon new evidence of Frank's innocence, was for a speedy reversal of his conviction. Justice Holmes, in deciding Frank's appeal by writ of error, stated that he "seriously doubt[ed] if Frank . . . had due process of law."[2] Yet, because the constitutional grounds were raised too late, the Court refused to hear the case. Frank's second appeal to the Supreme Court, on a writ of habeas corpus, was denied because:

> [E]rrors in law, however serious, committed by a court of proper jurisdiction cannot be reviewed by habeas corpus since habeas corpus cannot be substituted for a writ of error. [This sounds like *Catch-22*.] . . . The allegations of disorder were found by both of the State courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to the defendant and therefore insufficient in law to avoid the verdict . . . . The right of the defendant to be present at the rendition of the jury verdict . . . is but an incident of the right of trial by jury; and, since the state may, without infringing the 14th amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial . . . . The Georgia courts accorded Frank "the fullest right and opportunity to be heard according to established modes of procedure."[3]

Thus the Court decided that Frank had had due process of law. As Mr. Dinnerstein related, "the sad part of it all is that Frank had failed to get a new trial not because the higher court believed him to be guilty but because of technical mistakes made by his lawyer."[4]

The Leo Frank Case raises questions for the thinking lawyer as well as the layman. We can readily see that that paragon of our social and legal virtue, the Supreme Court, has altered its opinion since Leo Frank went to his death. Dinnerstein mentions many of these current decisions in a brief concluding chapter of the book. It is worth noting that it was a politician, rather than a jurist or professional moralist, who resisted injustice and prejudice in order to save a man's life. Perhaps the onus of procedural perfection has today shifted from the defendant to the state, but this does not really solve the major problem of form versus substance that is presently confounding lawyer and layman alike. Where procedural errors account for the conviction of innocent men, it is an injustice. Where such errors free guilty men, is it not then just as great an injustice? It is an interesting point to ponder.

Though Mr. Dinnerstein does a good job of handling the legal questions involved, he is at his best operating within his own genre of history and sociology. The sociological aspects of prejudice in *The Leo Frank Case* merit close examination. For, although the objects of prejudice tend to vary with the times and conditions, the effects of prejudice are always dangerous, especially where prejudice, whether based upon ignorance or self-righteousness, affects the law. It is certainly a greater tragedy that the people who hung Leo Frank were not a witless mob of southern red-necks, as one would like to imagine, but were the moral, the righteous, and the educated. In attendance at the hanging were several prominent jurists and local clerics, all convinced that they were doing the moral and proper thing. Leo Frank died because he was an outsider, a Jew, and therefore a symbol of the "urban north" and of the centers of sin known as cities. To the

[2] DINNERSTEIN, THE LEO FRANK CASE 110 (1968).

[3] *Id.* at 112.

[4] *Id.* at 113.

rural Georgia mind this was cause enough to readily believe that he was capable of committing murder and rape.

The Leo Frank Case is both legal and sociological history. In reading this book, lawyers must be aware of that frighteningly true maxim that those who fail to learn from history will be condemned to repeat it.

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Moment of Madness: The People vs. Jack Ruby. By ELMER GERTZ. Chicago: Follet Publishing Company, 1968. Pp. 564. $6.95.

Shortly after noon on November 22, 1963, the President of the United States was assassinated within the courthouse area in the city of Dallas. A short while thereafter Lee Harvey Oswald was apprehended, but only after Patrolman Tippitt was killed in an effort to question him. Oswald was placed in the Dallas city jail. Two days later on November 24, in the basement of the city jail as Oswald was being transferred to the county jail, he was shot by [Jack Ruby] . . . at close range, from which wound he died. Countless thousands witnessed this shooting on television.[1]

These words briefly describe the occurrence with which the world has now become most familiar—the bloody assassination of President John F. Kennedy and the bizarre events which followed on its heels. With these words, Presiding Judge Morrison of the Texas Court of Criminal Appeals began his review of the conviction of Jack Ruby, the man the world saw shoot and kill Lee Harvey Oswald. " 'The offense is murder; the punishment, death' "[2] had been the decision of the Dallas jury after hearing the most publicized trial in the history of the United States. On October 5, 1966, that decision was reversed. Then—once again—death intervened, and a second trial of Jack Ruby was never had.

Why did Jack Ruby kill Lee Harvey Oswald? Was the shooting part of a conspiracy? What was the relationship between the assassination of the President and the shooting of Oswald? These are only a very few of the questions that linger after more than five and one-half years. Distinguished Chicago attorney Elmer Gertz represented Jack Ruby after his conviction. In *Moment of Madness*, Gertz tells his story.

Especially for those who have followed the series of speculative accounts of the true nature of the assassination of President John F. Kennedy, *Moment of Madness* is an absolute must. It represents the necessary link in that series which began with Mark Lane's *Rush to Judgment.* For those who have read with thirst the various accounts, this writer submits: Elmer Gertz is to Mark Lane as Henry James was to Ian Fleming.

While a series of authors have conjured fantastic speculative ventures into the known and the unknown surrounding the assassination, whetting the appetite for further explorations, Elmer Gertz presents the tedious, clinical chronology of the life, trial, appeal, and death of Jack Ruby. Every seedy detail is covered.

[1] GERTZ, MOMENT OF MADNESS 432 (1968).

[2] *Id.*